TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~306.~~ 107

THE CITY OF LEXINGTON, PLAINTIFF IN ERROR,

vs.

JOSEPH C. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED NOVEMBER 23, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 306.

THE CITY OF LEXINGTON, PLAINTIFF IN ERROR,

vs.

JOSEPH C. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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a UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court before you, between Joseph C. Butler, plaintiff, and The City of Lexington is defendant, a manifest error hath happened to the great damage of the City of Lexington, as by its complaint appears; and, it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court at Covington, in said district, this 10th day of November, A. D. 1870, and of the independence of the United States the ninety-fifth year.

[SEAL.] J. M. BLACKBURN,
C. C. C., K. D.

Executed by leaving a copy in the clerk's office of the circuit court of the United States for the sixth circuit and district of Kentucky, at Covington, this 10th day of November, A. D. 1870.

J. M. BLACKBURN,
C. C. C., K. D.

b UNITED STATES OF AMERICA,
District of Kentucky, ss:

To JOSEPH C. BUTLER, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, District of Columbia, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the district of Kentucky, wherein The City of Lexington is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of November, in the year of our Lord 1870, and of our independence the ninety-fifth.

[SEAL.] BLAND BALLARD.

COVINGTON, *November 11th*, 1870.

We hereby acknowledge service by copy of the within citation.

STEVENSON & MYERS,
For Butler.

(Indorsed:) 272. Joseph C. Butler vs. The City of Lexington. Citation.

1 Pleas in the circuit court of the United States for the district of Kentucky, held at the United States court-room, in the city of Covington, in the district aforesaid, before the Hon. Bland Ballard, district judge of said district, and in the absence pro tempore of the Hon. Emmons, sole judge of said circuit court, on Wednesday the fifteenth day of December, in the regular December term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth year.

JOSEPH C. BUTLER *vs.* THE CITY OF LEXINGTON. } District of Kentucky.

Be it remembered that, on the twentieth day of April, A. D. 1869, came Joseph C. Butler, by his attorneys, Stevenson & Myers, and filed in the office of the clerk of the circuit court of the United States for the district of Kentucky, at Covington, in said district, his declaration against the city of Lexington; which said declaration is in the words and figures following, to wit:

2 "*Declaration.*"

United States circuit court, district of Kentucky, at Covington.

Joseph C. Butler, a citizen of the State of Ohio, complains of The City of Lexington, a municipal corporation, created by an act of the general assembly of Kentucky, of a plea that it render unto plaintiff the sum of $3,630 60, which it owes to and unjustly detains from plaintiff. For that whereas, by an act of the general assembly of the Commonwealth of Kentucky, approved January 9th, 1852, entitled an act to incorporate the Lexington & Big Sandy Railroad Company, and an act amendatory thereof, approved March 1st, 1854, entitled an act to amend the charter of the Lexington & Big Sandy Railroad Company, the said defendant was authorized to subscribe $150,000 to the capital stock of the Lexington & Big Sandy Railroad Company, a corporation created by the acts aforesaid, and in payment thereof to borrow money and in payment thereof to issue its bonds for such periods of time as it see fit, bearing interest from date, as a security for any loan made in that behalf or in payment for said stock; that, in pursuance of
3 said authority, the said defendant did, on the day of , 1853, subscribe $150,000 to the capital stock of said company, and in payment thereof the said city, by its common council, did make its 150 bonds, each dated the 15th day of Oct., 1853, each sealed with the corporate seal of said city, and signed by the president of said city council and by the clerk of said city council. And by the terms of each of said bonds the said city acknowledged itself to be indebted to the said Lexington & Big Sandy Railroad Company in the sum of $1,000, which it undertook & faithfully promised to pay unto said company, or unto any person to whom said company should order payment, thirty years thereafter, together with six per centum interest thereon, payable semi-annually, at the Bank of America in the city and State of New York, and for each installment of interest so to mature on each of said bonds, an interest warrant was annexed to each bond, whereby said

city likewise undertook and faithfully promised to pay said several & respective installments of interest unto the bearer of the coupon at the maturity of such installment & at the place aforesaid.

And plaintiff avers that afterwards, to wit, on the day of October, 1853, the said defendant did tender the said 150 bonds,
4 with the coupons annexed, unto the said railroad company, in payment for its subscription to the capital stock aforesaid; and the said railroad company did then & there accept & receive said bonds in payment and discharge of its aforesaid subscription to said stock.

And afterwards, to wit, on the day of 1853, the said railroad company did sell said bonds or a portion thereof unto divers persons unto the plaintiff unknown, and by its indorsement upon said bonds, sealed with the corporate seal of said company, & signed by its president, did make said bonds payable to bearer, and did deliver said bonds, so indorsed, together with the coupons thereunto annexed, unto the purchasers aforesaid; and plaintiff avers that he has since became the holder, owner, & bearer of four of said bonds, to wit, those numbered 102, 103, 105, & 108, together with all unpaid coupons thereunto annexed, of which bond and coupons he here makes profert; and plaintiff avers that there matured, on each of said bonds, a coupon for $30 each on the days following, to wit, on the 15th days of April & October, 1858; the 15th of April & October, 1859; the 15th days of April & Ootober, 1860; the 15th days of April & October, 1861;
5 the 15th days of April & October, 1862; the 15th days of April & October, 1863; the 15th days of April & October, 1864; the 15th days of April & October, 1865; the 15th days of April & October, 1866; the 15th days of April & October, 1867; the 15th days of April & October, 1868; that, at the respective days when said coupons matured, he had them at the said Bank of America, ready to receive payment thereof, yet the said defendant (although often requested so to do) hath not as yet paid the said sum of $3,630 60, above demanded, or any part thereof to the said plaintiff; but he, to do this hitherto, hath wholly refused, and still doth refuse, to the damage of the said plaintiff, $1,000, and therefore he brings this suit.

STEVENSON & MYERS,
For Plaintiff.

Entry.

On this day, to wit, May the 1st, 1869, in the April term, A. D. 1869, of said court, in the record of the proceedings thereof, in said entitled cause, is the following entry, to wit: This day come the defendant by its attorney, James Pryor, esq., and filed its plea in said entitled cause, which said plea is in the words and figures following, to wit:

6 *Pleas.*

United States circuit court.

JOSEPH C. BUTLER
vs.
THE CITY OF LEXINGTON. } Plea.

And the said defendant comes and defends the wrongs and injury, when, &c., and says actio non; because the defendant says that, by the 28 sec. of the charter of the Lexington & Big Sandy Railroad Com-

pany, the defendant was authorized to subscribe for $150,000 of stock in said company, upon the condition that a majority of the qualified voters of the city of Lexington, Kentucky, voting, should, at a time to be fixed by the company, cast their votes in favor of the subscription, and without such vote being cast in favor of said subscription, the city had no power or authority to make it, & were not authorized to do so. The defendant further states that the question was submitted to the vote upon a fixed by the company, but with the conditions following, prescribed by order of the mayor & counsel of said city—

1. That Lexington should be a point in the road.

7 2. That the subscription should not be obligatory until a million of dollars should be subscribed by others; &

3. That the bonds of the city might be received in payment of the subscription to be issued, one-third in one year, one-third the next year, and one-third the third year, and the proceeds thereof to be expended in the construction of that part of the road next to Lexington. The defendant says that the vote was cast for the subscription to be made on the conditions afs'd alone, and without this no vote has been cast in the matter by the voters of the city aforesaid. The defendant further says that a million of stock had not then been subscribed to said company, and has not since been subscribed, and that the mayor and counsel of the city refused to make the subscription until the million had been subscribed; but the company, on the 3 August, 1855, the million of stock not having been subscribed, commenced proceedings in the Fayatte circuit court ag't the defendant, and prayed for and obtained by the judg't of the court, a writ of mandamus to compell the city to make the subscription and issue the bonds, and

8 said city was, by force of said writ, compelled and did make said subscription, and issued and delivered to the company the 150 bonds for $1,000 each; but defendant further says that it appealed from the judgment of the court to the court of appeals of Kentucky; and upon the hearing in the court of appeals said judgment was, on the 2d January, 1858, reversed and set aside, or to so much of the judgement as ordered the bonds to be issued, the court holding that, as the million of stock had not been subscribed, the city had no authority and could not be required to issue said bonds. The said action was redocketed in the circuit court on the day of February, 1858, and a rule made upon the company in accordance with the opinion of the court of appeals to redeliver said bonds to defendant to be canc'led. The company, upon receiving said bonds, deposited 48 of them, together with many other bonds of the company, with their agent in New York, with directions to sell them for the use of the company; but before said agent had negotiated or disposed of said 48 bonds, or any of

9 them, and before the reversal of the judgement by the court of appeals, this defendant filed its petition in the Fayatte circuit court, to wit, on the 27th day of August, 1857, among other things, charges that said agent was insolvent and irresponsible, and that the company had deposited other bonds with said agent, amounting in all to about $600,000, and that said company was in great danger of having its bonds misapplied; all which def't or was there. The def't prayed for and obtained an injunction and order that said bonds of def't be deposited with the receiver of the court, to be sold and the proceeds applied under the order of the court. This action is still pending and undetermined in said court, which said order of the court was not obeyed. The company failing and refusing to deposit said bonds in accordance with the order of the court.

That the order of the court in the action of the company vs. the city to redeliver said bonds to the city, subsequently made, was not obeyed, and the 48 bonds and no one of them was redelivered to the city. The
10 defendant says that the bonds sued on are a portion of the 48 bonds af's'd. The proceedings for the return of said bonds in the action, cert. af's'd, of the company vs. the city, is still pending and undetermined in said court, and the defendant says that the agent of said company, either in violation of the said trust or with the direction of said company, after the filing def'ts petition ag't the company, and after process had been served on said company and said orders made therein, and after the case of the company vs. defendant had been redocketed in the circuit court, and the order made therein for the redelivering and cancelment of said bonds, and after full notice therein, transfer'ed and delivered to the pl'ff, Butler, the bonds sued on, and that said pl'ff, Butler, when said bonds were transfer'ed to him, well knew of the tendency of said actions, and of the judg'ts and orders made therein, and that said bonds had been issued under and by virtue of said writ of mandamus. The defendant further says that said company has failed and refused to appropriate the proceeds of any of def't's bonds to the construction of that part of
11 the road next to Lexington, and that said company has become and now is hopelessly insolvent, and has years ago abandoned the road, and has no means to construct said road, and that the same is unfinished and incomplete, especially that part of it next to Lexington; all which the def't is ready to verify. Wherefore, &c.

FISK & PRYOR.

2. And the said def't in further plea, says actio non, as to the coupons sued on—Nos. 12, 13, 14, 15, 16, 17, 18, 19, & 20; because he says that no action has accrued to pl'ff to have judg't *and* on said coupons or either of them within five years next before the of this action in the Fayatte circuit court; and this the def't is ready to verify.

FISK & PRYOR.

Entry.

On this day, to wit, May 12th, 1869, in the April term, A. D. 1869, of said court in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

This day come the plaintiff, by his attorney, H. Myers, esq., and
12 filed replication and demurrer herein, which said replication and demurrer is in the words and figures following, to wit:

Replication.

U. S. circuit court, district of Kentucky.

JOSEPH C. BUTLER, PLAINTIFF, *ag'st.* THE CITY OF LEXINGTON. } Replication & demurrer.

And the said plaintiff as to the said plea of the defendant firstly above pleaded, saith precludi non; because he says that the said plaintiff did not before, or at the time said bonds were transferred to him, have any knowledge, notice, or information whatever, of the pendency of said supposed actions or any or either of them, or of the supposed judgements or orders in those actions; or that said bonds had been issued under or by

virtue of the said writ of mandamus, in manner and form as defendant hath above alleged; and of this he puts himself upon the country.

And as to the said plea lastly above pleaded, the said plaintiff saith that it is not sufficient in law; and this he is ready to verify.

13 *Entry.*

On this day, to wit, December 15th, 1869, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

This day came the plaintiff, by his attorney, H. Myers, esq.; came, also, the defendant, by its attorneys, James Pryor & John F. Fisk. Defendant craved oyer of the bonds and coupons sued on in the declaration, to the giving of which plaintiff objected as coming too late after plea & replication and demurrer; but the court overruled the objection, and required plaintiff to give oyer of said bonds and coupons; to which ruling plaintiff excepted, and thereupon it was agreed that but one of said bonds and coupons need be read or transcribed on the record; but the agreement is in no manner to affect plaintiff's objection to giving oyer, or his exception thereto. The bond and coupon so read is in the words and figures following, to wit:

Certificate A. [No. 105.

UNITED STATES OF AMERICA,
State of Kentucky, City of Lexington:

LEXINGTON AND BIG SANDY RAILROAD COMPANY.

14 The city of Lexington acknowledges itself indebted to the Lexington & Big Sandy Railroad Company or order the sum of one thousand dollars, negotiable and payable at the Bank of America, in the city of New York, thirty years from the date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per centum per annum from date, payable semi-annually, at said bank, upon the presentation and delivery of the proper coupon, hereto attached, signed by the clerk of said city. This certificate is issued in part payment of the subscription of one hundred and fifty thousand dollars, by the city of Lexington, to the capital stock of said Lexington & Big Sandy Railroad Company by order of the mayor and council of said city, as authorized by a vote of the people, taken in pursuance of an act of the general assembly of the Commonwealth of Kentucky incorporating said railroad company, approved the ninth day of January, 1852.

[SEAL.] Witness the seal of the said city of Lexington, and the signature of the mayor of the said city, and the counter signature of the clerk thereof, this 15th day of October, one thousand eight hundred and fifty-three.

15 W'M SWIFT,
Mayor of the City of Lexington.
E. S. DUNCANSON, JR.,
Clerk of the City of Lexington.

(Written across the end:) One thousand dollars.
$1,000. Certificate A, No. 105.

Lexington & Big Sandy Railroad subscription, city of Lexington, Ken-

tucky. Interest warrant No. 9. Payable at the Bank of America, New York, on the 15th day of April, 1858.

$30. E. S. DUNCANSON,
Clerk of the City of Lexington.

The endorsement on the back of said bond is as follows:

For value received the within bond is hereby assigned to , or bearer, and the Lexington and Big Sandy Railroad Company guarantees the punctual payment of the within bond and the interest warrants thereto attached.

[SEAL.] R. APPERSON,
President.

Extract from the amended charter of the Lexington and Big Sandy Railroad Company. Approved March 1st, 1854.

"The manner in which written contracts on the part of said railroad company shall be executed shall be by the signature of the president of said company."

Defendant filed demurrer to replication, and plaintiffs filed joinder in said demurrer. Thereupon, the law arrising upon said demurrer
16 having been argued, it seems to the court that the law is for the plaintiff.

It is therefore considered by the court that said demurrer be overruled.

Defendant stands by said demurrer, and excepts to the ruling of the court in overruling the same.

The court now being sufficiently advised of and concerning the law as to the demurrer to the 2nd plea, it seems to the court that the law is for the plaintiff.

It is therefore considered that said demurrer be sustained.

To which ruling of the court defendant excepts.

And the defendant saying nothing further in bar or preclusion of the plaintiff's action, it is considered by the court that the plaintiff recover of the defendant the sum of three thousand six hundred and thirty dollars and sixty cents, the debt in the declaration demanded, together with interest thereon at the rate of six per cent. per annum from the 1st day of January, 1869, until paid, and also his costs herein expended.

On this day, to wit, December 20th, A. D. 1869, said defendant, by its attorney, filed in said clerk's office its appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal bond.

17 Know all men by these presents that we, The City of Lexington, Kentucky, M. C. Johnson, William C. P. Breckenridge, and Thomas Mitchell, are held and firmly bound unto Joseph C. Butler, in the sum of seven thousand two hundred and sixty-one dollars and twenty cents, to be paid to the said Joseph C. Butler, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated December 20th, A. D. 1869.

Whereas the above-named City of Lexington, Kentucky, hath prose-

cuted a writ of error to the Supreme Court of the United States, to reverse the judgement rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, (at Covington,) Now, therefore, the condition of this obligation is such, that if the above-named City of Lexington, Kentucky, shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

18 { CORPORATION LEXINGTON, KENTUCKY. } J. T. FRAZER, [SEAL.]
Mayor of City of Lexington.
M. C. JOHNSON, [SEAL.]
By his attorney in fact, JOHN F. FISK.
W. C. P. BRACKENRIDGE, [SEAL.]
By his attorney in fact, JOHN F. FISK.
THOMAS MITCHELL, [SEAL.]
By his attorney in fact, JOHN F. FISK.

Signed & sealed in the presence of—
J. M. BLACKBURN,
C. C. C., K. D.

Know all men by these presents that we, the subscribers, authorize John F. Fisk to affix our names and seals to an appeal bond, as sureties of The City of Lexington, upon an appeal taken, or about to be taken, by The City of Lexington, from a judgement or decree of the circuit court of the United States for the Kentucky district, at its term now in session in the city of Covington, in an action or suit in which J. C. Butler is plaintiff, and said City of Lexington is defendant, and the acts of our said attorney shall be as binding as if affixed by us personally.

Witness our hands and seals this 17th day of December, 1869.

M. C. JOHNSON, [SEAL.]
W'M C. P. BRACKENRIDGE. [SEAL.]
THOMAS MITCHELL. [SEAL.]

19 STATE OF KENTUCKY,
Fayette County, sct:

I, Allie G. Hunt, clerk of the county and State aforesaid, do hereby certify that the foregoing power of attorney of M. C. Johnson, W. C. P. Breckenridge, and Thomas Mitchell, to John F. Fisk, to affix their three names and seals to an appeal bond as surities of The City of Lexington, was this day produced in my office and acknowledged by the said M. C. Johnson, W. C. P. Brackenridge, and Thomas Mitchell to be their act and deed, and consented that the same be certified to the proper office for record.

Witness my hand and seal of office this the 17th day of December, 1869.

Att.: ALLIE G. HUNT, *Clerk.*

[United States inter. revenue stamp, 50 cents—conveyance.]

20 DISTRICT OF KENTUCKY, *ss:*

I, James M. Blackburn, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing, to be a true and correct and complete transcript of the record of all the proceedings had in said court, in said entitled cause, wherein said Joseph

C. Butler is plaintiff, and The City of Lexington is defendant, as the same appears of record remaining in my custody.

It testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Covington, in said district, this sixteenth day of November, A. D. 1870, and of our independence the ninety-fifth.

[SEAL.] J. M. BLACKBURN, *Clerk.*

21 *Writ of error.*

UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgement of a plea which is in said circuit court before you, between Joseph C. Butler, plaintiff, and The City of Lexington is defendant, a manifest error hath happened, to the great damage of The City of Lexington, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf:

You are hereby commanded, if judgement be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may
22 cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Covington, in said district, this 10th day of November, A. D. 1870, and of the independence of the United States the ninety-fifth year.

[SEAL.] J. M. BLACKBURN,
C. C. C., K. D.

Citation.

UNITED STATES OF AMERICA,
District of Kentucky, ss:

To JOSEPH C. BUTLER, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kentucky, wherein The City of Lexington its plaintiff and you are defendant in error, to show cause, if any there be, why the
23 judgement in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 10th day of November, in the year of our Lord 1870, and of our independence the ninety-fifth.

[SEAL.] BLAND BALLARD.

COVINGTON, *November 11th*, 1870.

We hereby acknowledge service by copy of the within citation.

STEVENSON & MYERS,
For Butler.

(Indorsement on cover:) No. 306. The City of Lexington, plaintiff in error, vs. Joseph C. Butler. Kentucky C. C. U. S. Filed 23d November, 1870.

COVINGTON, *November 11th*, 1870.

We hereby acknowledge service by copy of the within citation.

STEVENSON & MYERS,
For Butler.

(Indorsement on cover:) No. 306. The City of Lexington, plaintiff in error, vs. Joseph C. Butler. Kentucky C. C. U. S. Filed 23d November, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 107.

DECEMBER TERM, 1871.

THE CITY OF LEXINGTON, PLAINTIFF IN ERROR,

vs.

JOSEPH C. BUTLER.

AGREEMENT OF COUNSEL AND ADDITION TO RECORD.

FILED JANUARY 22, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 107.

DECEMBER TERM, 1871.

THE CITY OF LEXINGTON, PLAINTIFF IN ERROR,

vs.

JOSEPH C. BUTLER.

AGREEMENT OF COUNSEL AND ADDITION TO RECORD.

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1 *Agreement.*

Supreme Court of the United States.

THE CITY OF LEXINGTON, PL'T'FF IN ERROR,
ag'st
JOSEPH C. BUTLER, DEF'T IN ERROR.

It is hereby agreed between the parties to the above cause now pending on a writ of error in the Supreme Court of the United States, that the said cause was originally brought by Butler in the Fayette circuit court, Kentucky, and was subsequently removed from said State court into the United States circuit court for the district of Kentucky, as shown by a certified transcript of the record from said State court, which was filed in the United States circuit court, (& which is annexed hereto,) and which it is hereby agreed may be filed in the Supreme Court as a part of the transcript to accompany the above-entitled writ of error now pending in said court January 17th, 1872.

STEVENSON & MYERS,
For Butler.

2 Not having seen the record set out in the within agreement, I cannot agree to any fact not shown by it.

I understand that the clerk of the U. S. court for the district of Kentucky has made out and certified a portion of the record, which is not shown by the printed record in the U. S. Supreme Court.

I agree that the addition so made and certified may be filed in the Supreme Court, and there to have in said case all the force and effect it would have had had it been originally copied with the record originally filed and printed by plaintiff in error.

JOHN F. FISK,
For The City of Lexington.

3 Pleas before the Honorable Bland Ballard, judge of the circuit court of the United States for the sixth circuit and district of Kentucky, at a regular term of said court held for its April term, A. D. 1869, begun and held on Tuesday, the 20th day of April, A. D. 1869, at the city of Covington, in said district—present, Hon. Bland Ballard, judge.

Be it remembered that, heretofore, to wit, at a term of said court held for its April term, A. D. 1869, and on a day of said court continued and held, to wit, on Tuesday, the 20th day of April, A. D. 1869, came the plaintiff, by H. Myers, esq., his attorney, and filed transcript of the record from the Fayette circuit court of Kentucky; which transcript is in the words and figures as follows to wit:

4 *Preamble.*

STATE OF KENTUCKY,
Fayette Circuit Court, sct:

Pleas held before the Hon. C. B. Thomas, judge of the court for the circuit aforesaid, at the court-house, in the city of Lexington, Kentucky, on the 17th day of February, 1869.

Parties.

JOSEPH C. BUTLER, PLAINTIFF,
against
THE CITY OF LEXINGTON, DEFENDANT. } Petition.

Be it remembered that heretofore, to wit, on the 13th day of January, 1869, the plaintiff filed his petition herein in the words and figures following, viz:

Petition.

The said plaintiff saith that, by an act of the general assembly of Kentucky, approved January 9th, 1852, entitled "An act to incorporate the Lexington & Big Sandy Railroad Company," and by an act amendatory thereof, approved March 1st, 1854, entitled "An act to amend the charter of the Lexington & Big Sandy Railroad Company, the defendant,
5 The City of Lexington, a municipal corporation created by an act of the same general assembly was authorized to subscribe for $150,000 of the capital stock of said Lexington & Big Sandy Railroad Co., and in payment thereof was authorized to borrow money and to issue its bonds, bearing interest, as a security for any loan made in that behalf, or in payment for said stock.

That, in pursuance of said authority, the said defendant, acting through its official agents, its common or city council, did, on the 15th day of October, 1853, subscribe the said sum of $150,000 to the capital stock of said company, and in payment thereof the said city, by its aforesaid council, did make its 150 bonds for $1,000 each, each dated October 15th, 1853, each sealed with the corporate seal of said city, each signed by the president of said city council and by the clerk of said city council; and by the terms of each of said bonds the said city acknownledged itself indebted to the said Lexington & Big Sandy Railroad Company in the sum of $1,000, which it undertook to pay said company or order, 30 years thereafter, together with six per cent. per annum interest,
6 so to mature on said bonds; an interest warrant or coupon was annexed to each bond, and plaintiff avers that, afterwards, to wit, on the day of October, 1853, the said defendant did, by its agent aforesaid, tender said bonds to said railroad company in payment, & discharge of the subscription of $150,000 to its capital stock, and the said company did then and there accept and receive said bonds from defendant in payment, and discharge of its aforesaid subscription.

And afterwards, to wit, day of , 1853, the said railroad company did sell said bonds, or a portion of them, to divers persons unto the plaintiff unknown, and by its indorsement thereon did make said bonds payable to bearer, and did deliver said bonds so indorsed, together with the several coupons thereunto annexed, to the said purchasers. And plaintiff avers that he has since become the holder, owner, and bearer of four of said bonds, to wit, those numbered 102, 103, 105, & 108, together with the unpaid coupons thereunto annexed. And plaintiff further avers that the said defendant did pay or cause to be paid all of the coupons maturing on said bonds prior to the 15th day of April, 1858, but that the four coupons maturing on the said
7 15th of April, 1858, and all the coupons maturing on said bonds since the day last aforesaid remain due and unpaid, and are the property of the plaintiff.

Plaintiff avers that, at the maturity of the respective sets of coupons annexed to said bonds *annexed*, he caused them to be presented at the

said Bank of America, New York, and payment thereon demanded; but he avers that payment was then and there refused, and that the said defendant had no funds at said bank on the said 15th of April, 1858, nor at any *day* time since that day, with which to pay said coupons, or any part thereof. He avers that, by the laws of said State of New York, where said bonds and coupons are made payable, interest at the rate of 7 per cent. is lawful, and he claims that he is entitled to recover from said defendants interest after the said rate of 7 per centum per annum on the amount of each of said coupons from the respective days when they matured. He says that the interest on said bonds was payable semi-annually, to wit, on the 15th days of April and October in each year, each semi-annual installment of interest on each bond
8 being $30, and each of said coupons is for the said sum of $30 00.

He files herewith an account showing the amount of said coupons so due and unpaid, together with interest thereon after the rate of 6 per centum per annum, up to the first of January, 1869, amounting to the sum of $3,504 60. He also files herewith, as part hereof, one of said bonds, to wit, No. 102, with the coupon maturing April 15th, 1858, together with all coupons since maturing thereto annexed, (said bond since withdrawn by attorney,) and will produce the residue of said bonds and coupons on the trial of this action if required.

Wherefore he prays judgement for $3,630 60, with interest from January 1st, 1869, until paid, and for his costs and proper relief.

STEVENSON & MYERS,
For Plaintiff.

The account referred to in the foregoing petition is as follows:

The City of Lexington in ac. with Joseph C. Butler.

1869.

Jan. 18th. To the following coupons due on bonds 102, 103, 105, & 108, issued by The City of Lexington to the Lexington & Big Sandy Railroad Company,
9 under date of Oct. 15th, 1853, each bond being for $1,000, due 30 years after date, with coupons annexed for the interest, to wit:

4 coupons due April 15th, 1858	$120 00
Interest from Ap'l 15th, '58, to Jan. 1st, 1869	77 10
4 coupons due Oct. 15th, 1858	120 00
Interest	73 50
4 coupons due April 15th, 1859	120 00
Interest	69 90
4 coupons due Oct. 15th, '59	120 00
Interest	66 30
4 coupons due April 15th, '60	120 00
Interest	62 70
4 coupons due Oct. 15th, '60	120 00
Interest	59 10
4 coupons due April 15th, '61	120 00
Interest	55 50
4 coupons due Oct. 15th, '61	120 00
Interest	51 90
4 coupons due April 15th, '62	120 00
Interest	48 30
	$1,644 30

Am't bro't over		1,644 30
4 coupons due Oct. 15th, '62		120 00
Interest		44 70
4 coupons due April 15th, 1863		120 00
Interest		41 10
4 coupons due Oct. 15th, 1863		120 00
Interest		37 50
4 coupons due April 15th, 1864		120 00
Interest		33 90
4 coupons due Oct. 15th, 1864		120 00
Interest		30 30
4 coupons due April 15th, 1865		120 00
Interest		26 70
4 coupons due Oct. 15th, 1865		120 00
Interest		23 10
4 coupons due April 15th, 1866		120 00
Interest		19 50
4 coupons due Oct. 15th, 1866		120 00
Interest		15 90
4 coupons due April 15th, 1867		120 00
Interest		12 30
4 coupons due Oct. 15th, 1867		120 00
Interest		8 70
4 coupons due April 15th, 1868		120 00
Interest		5 10
4 coupons due Oct. 15th, 1868		120 00
Interest		1 50
	$3,504	60
Add one per cent. to make 7 per cent.		126 00
	$3,630	60

Summons.

The Commonwealth of Kentucky to the sheriff of Fayette County, greeting:

You are commanded to summon The City of Lexington to answer on the first day of the next February term of the Fayette circuit court a petition filed against her in said court by Joseph C. Butler, and warn her that upon her failure to answer, the petition will be taken for confessed, or she will be proceeded against for contempt; and you make due return of this summons on the 1st day of the next February term of said court.

Witness J. B. Rodes, clerk of said court, this 13th day of January 1869.

J. B. RODES, *C. C. C.*

Return.

Executed by delivering a true copy of the within summons to J. G. Chinn, mayor of the city of Lexington, Ky.

January 14th, 1869.

R. S. BULLOCK, *S. C.*

Bond for costs.

JOSEPH C. BUTLER
vs.
THE CITY OF LEXINGTON. } Bond.

We undertake that the plaintiff, Joseph C. Butler, shall pay to The City of Lexington, and to the officers of the Fayette circuit court, all
12 costs that may accrue to them in this action, either in the Fayette circuit court or in any other court to which it may be carried.

Feb. 10th, 1869.

HARVEY MYERS.

Att.: JNO. B. MORTON, *D. C. 'f C. C.*

And afterwards, to wit, at a court continued and held in and for the circuit aforesaid, on the 17th day of February, 1869, on motion of defendant, time is allowed her till the 1st day of the next term to file her answer herein, and the case is continued.

Plaintiff's motion for removal.

Came the plaintiff, Joseph C. Butler, by his attorney, Harvey Myers, and the defendant, by her attorneys, M. C. Johnson & R. A. Buckner, and the plaintiff filed his petition and affidavit herein for the removal of this cause for trial into the United States circuit court for the district of Kentucky. The said Butler also tendered his bond, with Harvey Myers surety, conditioned according to act of Congress, which bond & surety are approved for the amount specified in the bond, and the same is ordered to be filed, and thereupon the said Butler moved the said court to proceed no further in the cause.

The petition and affidavit referred to in the foregoing are in the following words, viz:

13 *Petition and affidavit of pl'ff.*

The plaintiff and affiant, Joseph C. Butler, states that he was, at the time of the institution of this suit, and yet is, a citizen and resident of the State of Ohio, and that the defendant, The City of Lexington, is a municipal corporation created by an act of the general assembly of Kentucky, and is a citizen of Kentucky; that this court is held in said city, and the above-entitled action is a privy cause to be tried by a jury taken from the county of Fayette, of which said City of Lexington composes part, that from prejudice and local influence he does not believe he will be able to obtain justice in said court.

Wherefore he petitions this court that it take no further steps in this cause, and that the same be removed for trial into the United States court for the district of Kentucky, in accordance with the act of Congress of March 2d, 1867.

JOSEPH C. BUTLER.

Subscribed and sworn to before me by Joseph C. Butler this 13th day February, 1869.

H. CLAY WHITE,
Clerk Kenton Circuit Court.

14 *Pl'ff's bond.*

We, Joseph C. Butler, principal, and Harvey Myers, surety, acknowledge ourselves to be indebted to The City of Lexington in the sum of five thousand dollars; to the payment of which we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

But this bond is upon the condition that, whereas the said Butler has made application for the removal of the above-entitled cause into the United States circuit court for the district of Kentucky, for trial in accordance with the act of Congress in that behalf provided:

Now, should said Butler enter in said United States circuit court, on the first day of its next term, copies of all process pleadings, depositions, testimony, and other proceedings in the cause of Joseph C. Butler against The City of Lexington, now pending in the Fayette circuit court, Ky., and shall enter his appearance in said court, and do and perform all other acts in that behalf required by the act of Congress of March 2d, 1867, entitled "An act to amend an act entitled 'An act for the removal of causes, in certain cases, from State courts,'" approved July 27th, 1866, then this bond to be void; otherwise to remain in
15 full force.

JOSEPH C. BUTLER.
HARVY MYERS.

Attest:
H. CLAY WHITE.

STATE OF KENTUCKY,
Fayette County, ss:

The affiant, Harvey Myers, says that he is worth $10,000 in unencumbered real estate, situated in Kentucky, and subject to execution.

HARVY MYERS.

Sworn to before me, by said Harvey Myers, this 17th of February, 1869.

Att.: J. B. MORTON, *D. C. & C. C.*

STATE OF KENTUCKY,
Fayette Circuit Court, sct:

I, J. B. Rodes, clerk of the court for the circuit aforesaid, do certify that the foregoing eleven pages contain a full, true, and complete transcript of the record and proceedings had in the case mentioned in the caption hereof to this date.

Given under my hand this 12th day of March, 1869.

Attest: J. B. RODES, *C. & C. C.*

16 DISTRICT OF KENTUCKY, *ss:*

I, James M. Blackburn, clerk of the circuit court of the United States for said district, at Covington, certify that the foregoing 14 pages, this included, contain a true copy of the order, filing, and the transcript of the record in the Fayette circuit court, in the case of Joseph C. Butler versus The City of Lexington, as the same appear of record and on file in my said office.

Witness my signature and the seal of said court this 14th day of December, A. D. 1871, and of our independence the 96th.

[SEAL.] J. M. BLACKBURN, *Clerk.*

(Indorsed:) Jos. C. Butler vs. The City of Lexington.

(Indorsement on cover:) No. 107. The City of Lexington, pl'ff in error, vs. Joseph C. Butler. Addition to record. Sup. Court U. S., 1871. Dec. term. Filed 22 January, 1872.

2 Allied Ways 84

Supreme Court of the United States.

December Term, 1871-2.

CITY OF LEXINGTON, *Plaintiff in Error,*

Against }

JOSEPH C. BUTLER, *Defendant.*

Brief for Plaintiff in Error.

JOHN F. FISK.

L. D. CRONINGER PRINT, Cor. 5th and Madison Sts., Covington.

Supreme Court of the United States.

CITY OF LEXINGTON, *Plaintiff in Error.*

Against } *Brief for Plaintiff in Error.*

JOSEPH C. BUTLER, *Defendant.*

Errors Assigned by Plaintiff.

I.—The Court erred in giving judgment for Butler, for want of jurisdiction.

II.—In overruling the demurrer to the replication to the first plea.

III.—And in sustaining the demurrer to the second plea.

The Pleadings.

THE DECLARATION, PP. 2 AND 3 OF THE RECORD.

It is alleged in the declaration that the City of Lexington—a Kentucky municipal corporation—was authorized by an act of the Legislature of Kentucky to subscribe

$150,000 to the capital stock of the Lexington and Big Sandy Railroad Company, a company incorporated by an act of the Kentucky Legislature, and to execute bonds therefor, payable to the order of said company.

That the city did, on the — day of ———, 1853, subscribe the $150,000, and execute the bonds, payable thirty years thereafter, with interest, payable semi-annually, at the Bank of America, New York. That coupons for the interest were attached to the bonds, whereby said city promised to pay the interest to the bearer.

That on the — day of ———, 1853, the company sold a portion of the bonds, and by its indorsement thereon made said bonds payable to bearer, and that since that time the defendant in error, Joseph C. Butler, had become the holder and owner of the bonds Nos. 102, 103, 105 and 108, with the coupons attached, and that he had presented the coupons Nos. ———, which had matured, for payment, at the Bank of America, and that payment had been refused.

I refer to a copy of one of the bonds, and the indorsement thereon, and to one of the coupons, on pp. 6 and 7 of the Record.

THE PLEAS 1 AND 2, PP. 3, 4 AND 5.

First Plea.—It is, in substance, alleged in this plea that the city was authorized to make the subscription of the $150,000, on condition that a majority of the qualified voters of the city, at a time to be fixed by the company, should cast their votes in favor of the subscription, and that without such a vote the city had no authority to make the subscription. That the question was submitted upon a day fixed by the company, but with the following conditions prescribed by the city:

1. That the city should be a point on the road;

2. That the subscription should not be obligatory until a million of dollars should be first subscribed by others; and

3. That the city's bonds might be received in payment of the subscription—one-third in one year, one-third in two years and one-third in three years—and that the proceeds should be expended in the construction of that part of the road next to the city.

That the vote was cast in favor of the subscription, upon the conditions aforesaid.

It is further alleged that the million of dollars not having been subscribed, the city refused, upon the application of the company, to make the subscription or to issue the bonds; and that the company thereupon, on the 3d day of August, 1853, commenced proceedings in the Fayette Circuit Court against the city, and prayed for and obtained a writ of *mandamus* to compel the city to make the subscription and execute the bonds; and that said city was compelled by said writ, and did make the subscription and issue the bonds.

The city appealed to the Court of Appeals of Kentucky, and upon the hearing of the appeal the judgment was, on the 2d day of January, 1858, reversed and set aside as to so much of the judgment as ordered the city to issue the bonds; the Court holding that as the million of dollars had not been first subscribed by others, the city had no authority to issue the bonds.

This action was redocketed in the Circuit Court on the — day of July, 1858, and a rule made upon the company in accordance with the opinion of the Court of Appeals, to redeliver the bonds to be canceled.

The company failed and refused to redeliver the bonds —it failed to obey the rule of the Court.

That before said company had negotiated the bonds sued upon, and before the reversal of the judgment aforesaid by the Court of Appeals, the city, on the 27th day of August, 1857, filed its petition in the Fayette Circuit Court against the company, charging, among other matters, that the company was insolvent and irresponsible, and that there

was great danger, if said bonds were negotiated, that the proceeds would be misapplied.

The city obtained an injunction, and an order that the bonds be deposited with the receiver of the Court, to be sold and the proceeds applied under the order of the Court.

These orders, although process was duly served on the company, were not obeyed; the bonds were not delivered to the receiver; that both actions were still pending.

It is further alleged that after the commencement of the action aforesaid, and after the reversal of the judgment by the Court of Appeals, and after the injunction and order was made in the action of the city against the company, and after process was served on the company in the action of the city against the company, and after the action of the company against the city had been redocketed and the rule made on the company to redeliver said bonds for cancelment, the company transferred and delivered the bonds to the said Butler.

It is further alleged that Butler *had notice of the proceedings aforesaid before said bonds were transferred to him.*

It is also alleged that the company had refused and failed to appropriate the proceeds of the bonds to that portion of the road next to the city, and that the company was hopelessly insolvent and had long since abandoned the road, and that the road was not completed, especially that portion next to the city, and that the company had no means for its completion.

REPLICATION TO THE FIRST PLEA, PP. 5 AND 6.

The replication to the first plea traverses only so much of the plea as alleges notice to Butler of the proceedings in the actions aforesaid.

DEMURRER TO THE REPLICATION, P. 7.

The plaintiff in error demurred to the replication. The demurrer was overruled, and the plaintiff stands by it, and excepts to the ruling of the Court.

SECOND PLEA, P. 5 OF THE RECORD.

As to the coupons sued upon, Nos. 12, 13, 14, 15, 16, 17, 18 19, 20, the plaintiff in error pleaded the five years' statute of limitations. To this plea the defendant in error demurred. The Court sustained the demurrer, to which ruling the plaintiff excepted.

Whereupon judgment was rendered for defendant in error.

ERROR I.

TO THE JURISDICTION OF THE CIRCUIT COURT.

It appears in the declaration that the City of Lexington and the Lexington and Big Sandy Railroad Company were both incorporated by the Legislature of Kentucky, and that the bonds sued on were made payable to the order of the company. Therefore the Circuit Court would not have had jurisdiction in an action on the bonds by the company against the city.

I refer to Section 11 of the Judiciary Act of 1789:

"The Circuit Courts shall have original cognizance concurrent with the several States of all suits * * * * between a citizen of the State where the suit is brought and a citizen of another State."

It is provided by the same section:

"That no District or Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chore* in *action*,

in favor of an assignee, unless such suit may have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

I refer to *Sheldon* v. *Sill*, 8 Howard 448, and *Gibson* v. *Chew*, 16 Peters 315.

The want of jurisdiction appears in the declaration, and therefore it was not necessary to demur or to plead to the jurisdiction.

~~Walton~~ Wallen v. *Williams*, 7 Cranch 602.

If it had been necessary to plead or demur, yet, as there was a demurrer to the replication to the first plea, and to the second plea, the judgment of the Court on the demurrer should have been for the plaintiff in error, for want of jurisdiction, as shown by the declaration.

A demurrer to a plea or replication reaches back to the declaration, and should be sustained as to the declaration if it be defective.

Bank U. S. v. *Smith*, 11 Wheaton 171.

ERROR II.

The Court erred in overruling the demurrer to the replication to the first plea, and in giving judgment for Butler.

The bonds were transferred to Butler after process was served in the action of the city against the company, and after the injunction had been granted and the order made that the company deposit the bonds with the receiver of the Court. And after the judgment in the action of the company had been reversed and the case redocketed in the

Court below, and the order made that the bonds be redelivered for cancelment—the Appellate Court having held that the city had no authority to issue the bonds.

I argue that the facts alleged in the plea other than that of notice to Butler—which was alone traversed by the replication—were sufficient to bar the action, and that the allegation of notice of the proceedings in Court were not necessary.

Butler was bound to take notice of these proceedings and was estopped to deny notice.

If the transfer of these bonds during the pendency of these proceedings were allowed, there would be no end of litigation, for so soon as a new party should be made, he might transfer to another, and thus make the litigation interminable.

This rule of *lis pendens* is peculiarly applicable to negotiable paper, as this Court has held similar paper to be.

For no matter how fraudulently the holder may have obtained the paper, yet the maker could have no remedy except by suit, for the holder could, and generally would, transfer to innocent persons.

Chancellor Kent says (1st Johnson's Ch'y Reports 579-580):

> "All persons who come in *pendente lite*, though they be third persons, and no parties to the suit, they and their interest (without exception) shall be bound and avoided by the decree." * * "It would be impossible, as I apprehend, to mention any rule of law which has been established on higher authority or with more uniform sanction."

The Chancellor refers to various other authorities sustaining this rule.

A third person who acquires the property in litigation from either party, will not be permitted to controvert the ultimate decisions, and no notice of the pendency of the action is necessary.

Watson v. *Wilson*, 2 Dana (Ky. Rep.) 408.

There is also a case referred to in 2d Randolph's Rep. (Virginia), wherein it is said:

"* * * The necessity of this rule is so obvious that there is no occasion to assert the presumption of notice of the pendency of the suits to justify the rule. The rule applies where there might have been a physical impossibility that the purchaser could have known of the existence of the suit."

It is said in *Debrell* v. *Foxworthy's Heirs*, 9 B. Mon. 230:

"That a purchase is held to be made *pendente lite* when made after abatement of the suit by death, or before a writ of error is prosecuted, and such purchase is subject to the final decession of the action."

"And when the proceedings are in *rem* an attachment or injunction is not necessary, as the *lis pendens* operates as a lien."

~~*Bartlett v. Strait et al.*~~, 3 B. Mon. 115.

Bullett vs Stewart

Now, there had been a final judgment in the highest Court of the State that the city had no authority to issue the bonds, and at the time the bonds were transferred to Butler by the company there was a rule pending requiring the company to redeliver the bonds for cancelment.

No stronger case could be presented, and, unless actual notice is required, so as to show fraud, or that he was not in fact an innocent holder, the plea, without the allegation of notice, should have been held sufficient, and the demurrer to the replication ~~overruled~~. sustained

If notice in fact was not necessary, if the rule of law be as asserted in the cases referred to above herein, does he not stand in the same attitude as if he had notice in fact?

Such, we argue, is his condition, and we know of no reason why the rule as to *lis pendens* is not as applicable to negotiable paper as to any other subject of litigation.

The defense set out in the plea would have been certainly a bar to any action by the company on the bonds. And the city, before the bonds are negotiated, are advised of the facts, and had no remedy other than that pursued by it. The city could do no more than it has done to prevent

the negotiation of the bonds, and if it be held by this Court that the rule of *lis pendens* is not applicable to negotiable paper, such as the Court has ruled this to be, then there is no relief, and the city, though forced by the wrongful action of the Fayette Circuit Court to issue the bonds, will be compelled to pay these bonds, now amounting, with interest, to some three hundred thousand dollars.

No injunction, no attachment or rule of court can be of any avail, if the party sued can at pleasure transfer such paper, although such transfer may be in violation of such rules and judgments of the court.

I have not been able to find any case where negotiable paper has been excepted from this rule of *pendente lite*, and I assume from the nature and character of the paper, that there is no case—that there is no such ruling.

ERROR III.

IN SUSTAINING THE DEMURRER TO THE SECOND PLEA—STATUTE OF LIMITATION.

No action had accrued on the coupons Nos. 12, 13, 14, 15, 16, 17, 18, 19 and 20 within five years before the institution of this action.

If the bonds be negotiable, the coupons partake of the same character. The limitation to actions on bills of exchange, indorsements thereof, or promissory notes placed on the footing of bills of exchange, is five years.

Rev. Stat. Ky., Vol. 2 Ch. 63 Art. 3 Sec. 2 p. 127.

The Court held the bonds to be negotiable, but sustained the plea: in which it seems to me there is error.

I respectfully ask a reversal of the judgment.

JOHN F. FISK,
For Plaintiff in Error.

AUTHORITIES CITED.

—o—

JURISDICTION.

Judiciary Act of 1789, Sec. 11.
Shelden v. *Sill*, ~~17~~ Howard ~~196~~. 8 - 448
Gibson v. *Chew*, 16 Peters 315.
Walker
~~Walton~~ v. *Williams*, 7 Cranch 602.
Bank U. S. v. *Smith*, 11 Wharton 171.

LIS PENDENS.

1st Johnson's Ch'y Reports, 579-580.
Watson v. *Wilson (Ky. R.)*, ~~8~~ 5 Dana 408.
2 Randolph Va. R., cited in Watson v. *Wilson supra.*
Debrell v. *Foxworthy's Heirs*, 9 B. Mon. 230.
~~*Bartlett v. Strait et al.*~~, 3 B. Mon. 115.

Bullitt vs Seward

LIMITATION.

Rev. Stat. Ky., Vol. 2 Ch. 63 Art. 3 Sec. 2 p. 127.

Supreme Court of the United States.

December Term, 1871-2.

CITY OF LEXINGTON, *Plaintiff in Error.*

vs.

JOSEPH C. BUTLER, *Defendant.*

Supplementary Brief for Plaintiff in Error.

JOHN F. FISK.

L. D. Croninger Print, Corner 5th and Madison Streets, Covington, Ky.

Supreme Court of the United States.

December Term, 1871-2.

CITY OF LEXINGTON, *Plaintiff in Error.*

vs.

JOSEPH C. BUTLER, *Defendant.*

SUPPLEMENT TO THE BRIEF FOR THE CITY OF LEXINGTON.

I refer to the 6th. Section, Chapter 22, of the Revised Statutes of Kentucky, enacted in 1852:—

"All bonds, bills, or notes for money or property, shall be assignable, "so as to vest the right of action in the assignee: but not to impair the "right to any defense, discount or offset that the defendant has, and "might have used against the original, or any intermediate assignor be- "fore notice of assignment to the plaintiff."

By the 31st Section of the Kentucky Code of Practice, bills of exchange, promissory notes, placed upon the footing of bills of exchange, common orders and checks, are expressly excepted from the operation of the statute.

A statute similar to the one quoted above, except as to bills of exchange, was enacted by the Kentucky Legislature in 1798; and from that time to the present, it has been uniformily held by the Kentucky Courts, that the maker of a bond or promissory note, though payable to order, may make any defense against the action of the assignee, which he might have made against the action of the original payee.

The bonds to which the coupons sued on are attached, are made payable to the order of the Lexington and Big Sandy Railroad Company, and the bonds due are endorsed to the bearer.

These bonds, we contend, are not bills of exchange, or commercial paper, but are within the provisions of the statutes above quoted; and that the City of Lexington may make any defense against the action of the assignee, that it could have made against the action of the Company.

We refer to some of the decisions of the Kentucky Court of Appeals upon these statutes: The *Sharps* v. *Eccles & Banta*, 5 Monroe, 71. This decision was rendered on the statute of 1798: the statute is quoted in the decision. *Hunt* v. *Brand's Hrs.*, 5 Ben. Mon., 562, and *Kelly & Co.*, v. *Smith & Shotwell*, 1 Metcalfe, 314.

We are not aware of any decision of this court on similar

bonds, contrary to the ruling of the Kentucky Courts, where such bonds were issued and delivered in a State where there was a statute providing for such defenses.

If we are right in this conclusion, then there can be no doubt that the defense set up in the first plea, is a valid defense to the action.

But if this court should be of opinion, that the bonds and coupons should have the force and effect of bills of exchange or commercial paper, and do not come within the purview of the Kentucky Statute—

Then we urge, in addition to the *lis pendens* relied upon in the original brief, that as the bonds were issued under coercion while the City Authorities were under arrest by order of the court, and so to be held until they should issue the bonds—that this alone is sufficient to authorize any defense as against the assignee, that might have been made against the Company.

The bonds were, in fact, issued while the City Officers were under duress, as it were—the effect at least was the same.

We contend that the bonds thus issued, were void; and that the defense is good and valid, especially in view of the fact, that the Court of Appeals reversed the judgment of the Circuit Court—holding that the City was not authorized to issue the bonds, and was acting legally and properly in refusing to do so.

The City did no wrong; it used all the means in its power

to prevent the issuing of the bonds—and it gave notice to the world, so far as it could do by its suits, of the circumstances under which it had been compelled to issue the bonds.

It certainly will be great injustice, if under the circumstances, the law of the land shall be found to hold the City liable for this large sum of money, without having received any consideration therefor.

JOHN F. FISK,

Of Counsel for Plaintiffs in Error.

AUTHORITIES CITED.

Stanton's Rev. Statutes Ky., Vol. 1, Ch. 22, Sec. 6, p. 268.

Ky. Civil Code of Practice, Sec. 31, Myers.

Moorehead & Brown's Statute Law of Ky., Vol. 1, Title 12, p. 150.

Sharps vs. *Eccles & Banta*, 5 Monroe, 71.

Hunt vs. *Brand's Heirs*, 5 Ben. Mon., 562.

Kelly & Co. vs. *Smith & Shotwell*, 1 Metcalfe, 314.

Supreme Court of the United States.

WINTER TERM 1871-2.

THE CITY OF LEXINGTON, *Plaintiff in Error,*

vs. } *Brief for Defendant.*

JOSEPH C. BUTLER, *Defendant in Error.*

THE City of Lexington, Kentucky, claiming to act under the authority of an Act of the General Assembly of Kentucky, did, in 1853, issue to the Lexington & Big Sandy Railroad Company, a number of bonds, each for $1,000, having thirty years to run, and bearing an interest of six per cent. per annuum, payable semi-annually, for which coupons were annexed to the bonds.

The bonds bear the corporate seal of the City and are signed by the Mayor, and countersigned by the City Clerk. They were payable to the Lexington & Big Sandy Railroad Company or order at the Bank of America, New York, and

were indorsed and assigned by the railroad company to bearer. They recite upon their face that—

"This certificate is used in part payment of a subscription of $150,000 by the City of Lexington to the capital stock of said Lexington & Big Sandy Railroad Company, *by order of the Mayor and Council of said City, as authorized by a vote of the people taken in pursuance of an act of the General Assembly of the Commonwealth of Kentucky incorporating said Railroad Company, approved, the 9th of January*, 1852."

They were sold in market overt by the Railroad Company, and being by the indorsement made payable to bearer, they circulated by delivery from hand to hand. Mr. Butler became the owner of four of them. The coupons for a number of years being unpaid, he commenced an action in the Fayette Circuit Court, which sits in the City of Lexington, for the recovery of the amount of those coupons, $3,630 60.

Before the trial came on, he removed the cause into the United States Circuit Court for the District of Kentucky, for trial, under the act of Congress of 1867.

On bringing the transcript of the cause into the United States Circuit Court, he filed a declaration in debt in that court, in conformity with the rules of proceeding in causes removed from the State Court.

To this declaration, the City of Lexington filed two pleas in bar.

To the first plea, Butler filed a replication, and to the second, a demurrer.

The City also filed a demurrer to Butler's replication, and issue being joined upon these two demurrers, the Court gave judgment for the plaintiff.

We suppose the only question to be determined by this Court is, whether the Circuit Court rightly ruled the law upon those two demurrers.

I.

As to the demurrer of the City to the replication. The plea, to which this replication was filed, went on to set forth a state of fact, from which it was claimed the bonds were issued without authority of law.

In the face of bonds which recite that they *were* issued by authority of law, such a plea would be bad, unless it also showed that Butler was not an innocent holder for value. The law presumes in favor of the holder, (1), that he took the bonds before they were due; (2), that he paid a valuable consideration for them; and (3), that he took them without notice of any latent defect which would render them invalid.

Bronson v. Lacross, 2 Wallace, 654.
Wood v. Lawrence, 1 Black, 386.
Alexander v. Springfield Bank, 2 Met. (Ky.) Reports, 534.
Nelson v. Cowing, 6 Hill, (N. Y.), 339.

The plea did not dispute the first two points, to-wit: That Butler took the bonds before they were due, and paid a valuable consideration for them. Hence these two presumptions stood in his favor, notwithstanding the plea. It did, however, aver that at the time he took the bonds, he had notice of the facts set forth in the plea, and relied on as rendering the bonds invalid. It was this averment of notice alone that rendered the plea good.

The replication traversed the averment of notice, and denied all knowlege or notice of any of the facts set out in the plea, at the time the plaintiff took the bonds.

By demurring to the replication, the City confessed Butler's denial of notice to be true, and thereby confessed away an allegation in its plea, which was absolutely necessary to render it good.

If it were true, as admitted by the demurrer, that Butler took the bonds without notice of the state of facts set out in the plea, and for a valuable consideration before their maturity, as the law *prima facie* presumes, then the case was for him, and the judgment of the Court upon this demurrer correct.

II.

As to Butlers's demurrer to the second plea.

This second plea is an attempt to rely upon the Statute of Limitation of five years, in force in Kentucky, to actions on simple contracts.

But the obligation to pay this interest is embodied in the bond itself, which is a specialty, under seal, and of a higher nature than simple contracts. Therefore no lapse of time, short of fifteen years, would bar an action on the bond, that being the period of limitation to actions upon specialties by the Statute of Kentucky. See Sectons 1 and 2 of Article 3, Chapter 63, *Revised Statutes of Kentucky*, from which it will appear that actions upon specialties is limited to fifteen years, and actions upon simple contracts to five years.

2 Stanton's Rev. Statutes of Kentucky, p. 126.

That bonds of this character are specialties, and that the coupons attached to them partake of their character, and are governed by the same period of limitation as governs the bond itself, was ruled by this Court in a recent case.

The City v. Lamson, 9 Wallace, 477.

It is submitted that the judgment should be affirmed.

STEVENSON & MYERS,

For Defendant.